IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-11

JOSEPH BOONE,

*Petitioner,*

v.

STATE OF GEORGIA,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia**

## BRIEF IN OPPOSITION FOR RESPONDENT

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### OPINION BELOW

The opinion of the Supreme Court of Georgia, reported at 243 Ga. 416, 254 S.E.2d 367 (1979), is accurately set forth in the Petition as is the unreported order of the trial court.

### JURISDICTION

Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1257(3), 28 U.S.C. § 2101(d) and U.S. Sup. Ct. Rule 22.1. For reasons we shall come to we believe that there is a want of jurisdiction in that: (1) the portions of a lengthy criminal trespass statute to which petitioner's constitutional attacks are chiefly (if not exclusively) directed are not involved in the case at bar (petitioner

essentially asking for advisory opinions about hypothetical questions, with no "case or controversy" within the meaning of Article III, Section II of the Constitution presented), and (2) the constitutionality of the precise portion of the statute which is involved is so settled as to negate the existence of any substantial federal question concerning its validity. See *Alonso v. The State of Georgia*, 231 Ga. 444 (1973), *appeal dismissed for want of a substantial federal question*, 417 U.S. 938 (1974).

## QUESTIONS PRESENTED

1. May petitioner successfully invoke this Court's jurisdiction to review his accusation under a criminal trespass statute by constitutional attacks on parts of the statute which are nowise related to the accusation?

2. Is the precise portion of the statute upon which the accusation is based so obviously constitutional as to preclude the existence of the sort of substantial and unresolved federal question which would merit the Court's plenary review of the matter?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While petitioner correctly cites the constitutional provisions and statutes involved, we would observe at the outset that in setting forth Section 1 of the criminal trespass statute of Georgia here in issue (i.e. Ga. Laws 1976, pp. 471-473, Ga. Code Ann. § 91-134) *in toto*, much is included that has no relationship or relevance at all to the actual accusation which commenced this litigation. The precise portion of Section 1 which is involved in the case at bar (i.e. the part of the statute upon which the



accusation was in fact based) is as follows:

> "The Authority and its security personnel are hereby authorized and empowered to remove any person from any such property or building when such person's activities interfere with or disrupt the activities and the operations carried on in such property or building or constitute a safety hazard to such property or building or the inhabitants thereof."

## STATEMENT OF THE CASE

Petitioner was arrested on September 15, 1976, on property of the State of Georgia known as the Georgia World Congress Center, a convention center located in Atlanta, Georgia. The misdemeanor accusation filed against petitioner charged that he had led approximately twenty-five persons who:

> "while upon the property and building of the State of Georgia, located at 285 Magnolia Street, N.W., known as the Georgia World Congress Center, interfered with and disrupted the activities and operations then and there being carried on in said property and building by singing and talking in loud voices, and by standing and kneeling in such close proximity so as to block the flow of pedestrian traffic in that part of the main lobby adjacent to the administrative offices,"

and that he refused to vacate the premises when directed to do so by proper authorities acting on behalf of the Georgia Building Authority.[1]

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[1] The Georgia Building Authority, an instrumentality of the State of Georgia and a public corporation, created by the legislature of the State of Georgia, acquires, operates and maintains certain properties and buildings for the use of agencies and departments of the State of Georgia. Ga. Laws 1967, p. 856 (Ga. Code Ann. Chapter 91-5A).

That this accusation is squarely based upon that particular sentence (and none other) of Section 1 of the criminal trespass statute quoted in the preceding section of this brief is, we think, too obvious to require amplification. Yet the trial court, apparently giving no heed at all to what part of the statute the accusation was in fact based upon, proceeded to agree *sub silentio* with petitioner's theory that the accusation could be contested by attacking the lengthy statute *in toto* as being "facially invalid" – *based on provisions, sentences and clauses which had absolutely no bearing at all on what the accusation was about.* The trial court declared the statute unconstitutional *in toto* and discharged petitioner, based upon what the trial court saw as an improper "authority" *to exclude persons from entering State properties* based upon a subjective estimation of intent (said to be a prior restraint on free speech), and an authority *to deny entry* because of a display of banners, placards, etc. This was done notwithstanding the fact that these "keep out" provisions, as the petition for certiorari itself clearly shows, were nowise involved. Petitioner and those he led were *not* denied entry (i.e. arguably a prior restraint) but had entered and were arrested only *after* creating a disturbance and blocking the flow of pedestrian traffic.

As ought to have been anticipated, this obviously erroneous ruling of the trial court was reversed by the Supreme Court of Georgia. The only thing unusual about the reversal was that the Supreme Court of Georgia, in what is properly to be considered as expansive dicta, not only reversed but pointed out the errors in the trial court's rationale concerning the questioned constitutionality of those parts of the lengthy criminal trespass statute *not actually involved in the case* [i.e. the "keep out" provisions



based upon "intent," as well as the "banners and placards" prohibition which the Supreme Court of Georgia construed as requiring a showing of intent to disrupt, this being consistent with such cases as *Adderley v. Florida*, 385 U.S. 39 (1966)].[2]

## ARGUMENT

**I. Since the portions of Georgia's criminal trespass statute to which petitioner's attacks are directed are nowise related to the accusation or charges involved, there is a want of jurisdiction which we submit ought to be fatal to the grant of a writ of certiorari.**

In attacking portions of a multi-faceted criminal trespass statute which has no bearing at all on what he has in fact been charged with, petitioner fails, as we see it, to present a "case or controversy" within the meaning of Article III, Section II of the United States Constitution. This Honorable Court has repeatedly said that litigants are not entitled to advisory opinions on disputes which are of a hypothetical or abstract nature. E.g. *Barr v. Matteo*, 355 U.S. 171, 172 (1957); *Eccles v. Peoples Bank of Lakewood Village, California*, 333 U.S. 426, 432 (1948); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

Surely it is axiomatic that even were one to agree *arguendo* with petitioner's constitutional contentions concerning parts of the statute unrelated to the accusation in this particular case (and in fact we strenuously disagree with and think the Supreme Court of Georgia correctly

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[2] In *Adderley v. Florida*, 385 U.S. 39, 40, N.1 (1966) this Court rejected an attack on a Florida criminal trespass statute which was hinged to trespasses committed with "a malicious and mischievous *intent.*"

answered these contentions), it has long been the rule that the unconstitutionality of one part of an Act does not defeat the validity of a remaining portion of the Act which is, as it unquestionably is in the case at bar, capable of independent enforcement. See, e.g. *Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971); *United States v. Jackson*, 390 U.S. 570, 585 (1968); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932). This rule has been uniformly held applicable even where the valid and invalid provisions are in the same paragraph or section of the statute, see *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45, 55-56 (1908); *Loeb v. Columbia Township Trustees*, 179 U.S. 472, 489-490 (1900); 82 C.J.S. *Statutes* § 92, p. 152 (citing numerous state court decisions).

This rule is, or course, but a manifestation of the jurisprudential principle that judicial review of statutory enactments is not to be viewed as a "search out and destroy" mission, but that to the contrary:

> "The cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

It follows that in a criminal proceeding attacks upon a criminal statute for vagueness or for any other claimed constitutional defect, need not be considered where the indictment is not based upon the language attacked but rests upon other portions of the same statute. *Collier v. United States*, 283 F.2d 780, 781 (4th Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). This is, of course, exactly the situation in the case at bar.



**II. The precise provision of the statute which is involved in this case is clearly constitutional and poses no substantial federal question which could conceivably be said to call for plenary review by the Supreme Court of the United States.**

Looking to the actual "accusation" giving rise to this litigation, we see that petitioner has been charged with blocking pedestrian traffic and interfering with activities and operations in progress in a public building, the charge being based upon the statutory provision authorizing the removal of persons from State property when their activities "interfere with or disrupt the activities and operations carried on in such property or building." [3] The facts are in substance not unlike those presented in *Alonso v. The State of Georgia*, 231 Ga. 444, 202 S.E.2d 37 (1973), *appeal dismissed for want of a substantial federal question*, 417 U.S. 938 (1974), which involved a constitutional attack upon an analogous criminal trespass provision.

We submit that this Court's disposition of *Alonso* should be controlling here. As long ago as *Hague v. C.I.O.*, 307 U.S. 496, 515-516 (1939), the Court pointed out that:

> "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peach and good order. . . ."

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[3] Since the case has not yet proceeded to trial on the merits, no judicial determination of the facts has been rendered.

In *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), the Court said:

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech ... it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed."

In *Cox* this Court further emphasized that:

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." 379 U.S. *supra* at 554.

We respectfully submit that the sort of limitations or restrictions which a state may place upon assembly, petitioning and the group exercise of "free speech" obviously are (and must be if government is to function) greater in buildings than on the streets or in public parks. In *Adderley v. Florida*, 385 U.S. 39, 47 (1966), this Court pointed out in a factual situation not unlike that presented in the case at bar, to wit: convictions under a criminal trespass statute of persons refusing to leave public property upon being directed to do so:

> "The State, no less than a private owner of property, has power to preserve the property under its control *for the use to which it is lawfully dedicated.*" (emphasis added).



We submit in light of the above authorities, the accusation or charge actually involved in this case (i.e. obstructing pedestrian traffic and by noise interfering with and disrupting activities and operations then being carried on in the Georgia World Congress Center) clearly relates to *conduct* rather than to the substance of petitioner's "speech," and is so palpably devoid of merit as a legitimate First Amendment contention as not to warrant further argument before this Court.

## CONCLUSION

For the reasons stated petitioner's contentions and the questions he seeks to present to this Court are wholly unsubstantial and fail to present a federal constitutional issue which would warrant further consideration by this Court. We respectfully submit that petitioner's petition for issuance of a writ of certiorari should for this reason be denied.

Respectully submitted,

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